MICHAEL RODAK, JR.,

No. 79-6779

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WALTER LITTLE,

Appellant,

v.

GLORIA STREATER,

Appellee.

ON APPEAL FROM THE APPELLATE SESSION
OF THE SUPERIOR COURT OF CONNECTICUT

BRIEF FOR APPELLANT

JON C. BLUE
Legal Assistance to Prisoners
340 Capitol Avenue
Hartford, Connecticut 06106
(203) 566-2030
Court-appointed Counsel for Appellant

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

QUESTION PRESENTED

In a paternity proceeding that the State of Connecticut caused to be instituted by a recipient of public assistance against an indigent, incarcerated defendant, does Conn.Gen.Stat. §46b-168 (1979) violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States when applied to deny the use of blood grouping tests to the defendant solely because of his indigency?

PARTIES TO THE PROCEEDINGS

(1) *Walter Little,* the appellant, was the defendant in the proceedings below.

(2) *Gloria Streater,* the appellee, was the plaintiff in the proceedings below.

(3) *Carl R. Ajello,* the Attorney General of Connecticut, is a party to this proceeding pursuant to Conn.Gen.Stat. §46b-160 (1979).

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BRIEF FOR APPELLANT

OPINIONS BELOW

The opinion of the Appellate Session of the Superior Court of Connecticut (J.A. 25) is unreported. The order of the Supreme Court of Connecticut denying certification is reported at 180 Conn. 756, 414 A.2d 199 (1980). No opinions were filed by the Superior Court of Connecticut at the trial level.

JURISDICTION

The jurisdiction of this Court rests upon 28 U.S.C. § 1257 (2) (1976), the validity of Conn.Gen.Stat. § 46b-168 (1979) having been drawn into question on the ground of its being repugnant to the Constitution of the United States as applied in this case and the decision of the Appellate Session of the Superior Court of Connecticut being in favor of its validity.

The judgment of the Appellate Session of the Superior Court of Connecticut was entered on April 1, 1980. A Notice of Appeal to this Court, a copy of which appears at p.4a of the Appendix to the Jurisdictional Statement, was duly filed in the Appellate Session of the Superior Court on June 3, 1980. The case was docketed in this Court and a Jurisdictional Statement filed on June 16, 1980. This Court noted probable jurisdiction on October 6, 1980. (J.A. 27.)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Due Process and Equal Protection Clauses of Section 1 of the Fourteenth Amendment to the Constitution of the United States. That section provides, in relevant part, that:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves Conn.Gen.Stat. § 46b-168 (1979). That statute provides that:

> In any proceeding in which a question of paternity is an issue, the court, on motion of any party, may order the

mother, her child and the putative father or the husband of the mother to submit to one or more blood grouping tests, to be made by a qualified physician or other qualified person, designated by the court, to determine whether or not the putative father or the husband of the mother can be excluded as being the father of the child. The results of such tests shall be admissible in evidence only in cases where such results establish definite exclusion of the putative father or such husband as such father. The costs of making such tests shall be chargeable against the party making the motion.

STATEMENT OF THE CASE

On May 21, 1975, Gloria Streater, the appellee, gave birth to a female child, Kenyatta Chantel Streater. The sole factual issue in this case is whether Walter Little, the appellant, is Kenyatta's biological father.

Appellee was, at the time of Kenyatta's birth, a recipient of public assistance. As a requirement of continuing eligibility for such assistance, she was compelled by Conn.Gen. Stat. §46b-169 (1979) to disclose the name of Kenyatta's putative father to the Connecticut Department of Social Services.[1] The name she gave to a Department representative was Walter Little. (J.A. 14.)[2] The Department of Social Services then retained an attorney to bring a paternity action against appellant. (J.A. 10.)[3]

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[1]The Connecticut Department of Social Services has since been renamed the Department of Income Maintenance. Conn.Gen.Stat. §17-1b (1979).

[2]Kenyatta Streater's Birth Certificate omits all information concerning the identity of her father. (R. 30.)

[3]The State of Connecticut expended $332.20 in court costs and attorney's fees in suing appellant, an amount later taxed to appellant as costs. (J.A. 20.)

On July 11, 1977, appellee signed a petition seeking a judgment that Walter Little was the father of her child. (J.A. 3.) The action was filed in what was then termed the Court of Common Pleas, Geographical Area No. 6, in New Haven, Connecticut.[4] Walter Little was, at the time, incarcerated in the Connecticut Correctional Institution, Enfield. (J.A. 18.)

As discussed at pp. 10-11, *infra,* modern medical technology has developed standard blood grouping tests that scientifically and conclusively exonerate more than 90% of all falsely accused defendants in paternity proceedings. These tests were readily available in Connecticut at the time this action was instituted at a cost of $250.[5] Appellant, however, was completely without assets and had no income other than a nominal prison stipend. (J.A. 7.) His incarceration, of course, precluded any chance that he would be able to earn the laboratory fee. He was, in a word, indigent.[6] He consequently filed a Motion For Blood Grouping Test In Forma Pauperis on November 28, 1977. The Motion recited the facts of his indigency and requested a court order requiring appellee and her child to submit to a blood grouping test and a further order that the cost of such test be paid by the State of Connecticut. (J.A. 5.) On December 5, 1977, however, this Motion was denied by the court to the extent that it requested that the cost of such tests be paid by the State. (J.A. 8.)

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[4]The Court of Common Pleas was merged with the Superior Court of Connecticut on July 1, 1978, while this case was awaiting trial. Conn.Gen.Stat, §51-164s (1979).

[5]Interview with Herbert Silver, M.D., Director of Blood Bank and Immunohematology, Hartford Hospital, in Hartford, Connecticut (October 22, 1980). The cost of the test has recently been increased to $460. *Id.*

[6]The trial court later specifically found appellant to be indigent. (J.A. 23.)

The paternity action itself was tried before the court[7] on September 28, 1978. Appellant was still incarcerated at the time of trial and had been unable to afford a blood grouping test. Consequently, no such test was ever taken. (J.A. 12.) After the trial, on October 4, 1978, the court entered an order finding that appellant was the father of the child in question. (J.A. 2.)[8]

At a hearing in damages on October 16, 1978, the court found appellant liable for a total of $6,974.48 for the maintenance and support of the child in question through October 31, 1978, and attorney's fees. (J.A. 20.) Under Connecticut law, appellant will be additionally obligated to provide support for the child in question for the duration of her minority. Conn.Gen.Stat. §46b-215(a) (1979). The sole recipient of this judgment is the Connecticut Department of Finance and Control. (J.A. 21.)

Appellant appealed on the issue of whether the trial court erred in denying his Motion that the cost of a blood grouping test be paid by the State. On February 29, 1980, the Appellate Session of the Superior Court found no error. The Supreme Court of Connecticut denied certification on April 1, 1980.

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[7]Defendants in paternity proceedings in Connecticut, irrespective of means, may obtain jury trials only upon payment of a $45 fee. Conn.Gen.Stat. §52-258 (1979). *See Robertson v. Apuzzo,* 170 Conn. 367, 365 A.2d 824, *cert. denied,* 429 U.S. 852 (1976).

[8]Appellant admitted at the trial to a single act of intercourse with appellee at about the time Kenyatta Streater was conceived (J.A. 17), but presented testimony that appellee had also been intimate with a number of other men at the same time. Although appellee admitted a history of intimacy with one of appellant's witnesses, she denied that she had had sexual relations with any man other than appellant at the time of conception. (Untranscribed portion of September 28, 1978, testimony.) The trial judge evidently considered appellee to be the more credible witness.

HOW THE CONSTITUTIONAL QUESTION WAS RAISED AND DECIDED BELOW

At the earliest stage of the proceedings below, appellant raised the claim, in his Motion For Blood Grouping Test In Forma Pauperis, that the denial of an opportunity to obtain a blood grouping test because of his indigency "would deprive him of property without due process of law and deny to him the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States." (J.A. 5.) At this time, Conn.Gen.Stat. §46b-168 (1979) had not been construed as requiring the costs of blood grouping tests to be charged to the party moving for the tests irrespective of his means. Since the statute was not considered to be controlling by the trial court or either of the parties[9] there was no occasion at the trial level to draw its validity into question. The trial court's denial of appellant's Motion that the costs of blood grouping tests be paid by the State, however, plainly constituted a rejection of his constitutional claims.[10]

Appellant appealed to the Appellate Session of the Superior Court of Connecticut, reiterating his constitutional claims in his Assignment of Errors. While the instant case was on appeal, however, the Appellate Session rendered its decision in *Ferro v. Morgan,* 35 Conn. Supp. 679, 406 A.2d 873, *cert. denied,* 177 Conn. 753, 399 A.2d 526 (1979). In *Ferro,* the Appellate Session, for the first time, construed Conn.Gen.Stat. §46b-168(1979) as *mandating* that the

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[9]Conn.Gen.Stat. §46b-168 (1979) was not mentioned by the court or either party during the hearing on appellant's Motion. Transcript of December 5, 1977.

[10]In making its post-trial Findings, the trial court expressly rejected appellant's constitutional claims. (J.A. 23.)

costs of blood grouping tests be charged to the party moving for such tests, irrespective of his means, and upheld the constitutionality of this newly enunciated statutory requirement.

The Appellate Session considered appellant's constitutional claims in the instant case in light of its intervening decision in *Ferro v. Morgan.* It explicitly considered these claims as drawing the constitutionality of $46b-168 into question and expressly concluded that the statute does not violate the constitutional rights of indigent putative fathers. (J.A. 25.) The Supreme Court of Connecticut denied certification.

SUMMARY OF ARGUMENT

I.

Modern blood grouping tests conclusively exonerate more than 90% of all falsely accused defendants in paternity proceedings. Conn.Gen.Stat. §46b-168 (1979), which denies access to such tests to all defendants unable to pay for them, violates the Due Process Clause of the Fourteenth Amendment. Its denial of highly probative evidence solely on the basis of indigency is inconsistent with this Court's repeated concern for accuracy in the judicial process. A hearing characterized by such a denial is, moreover, not constitutionally meaningful where the person denied is an involuntary litigant; where he faces potential criminal consequences if he loses; where the State, with all its power and resources, is the real party haling him into court; where his indigence is caused by his incarceration by that very State; where a state evidentiary rule renders his testimony legally

insufficient to overcome the plaintiff's testimony, thus requiring him to produce other evidence if he is to prevail; and where the thing at issue is not something entirely reducible to monetary terms, but the paternity of a child.

II.

Connecticut's blood test rule creates two classes of involuntary litigants; those with assets, who can purchase swift, scientific, and reliable justice; and those without assets, who are thrust into swearing contests in which the pans of justice are loaded against them. Because there is no rational relationship between the ability to afford a laboratory fee and paternity or nonpaternity, and because the litigation at issue is fraught with criminal implications and has a direct impact on a family relationship, the egregious disparity in the quality of justice afforded these two classes of involuntary litigants denies indigent putative fathers the equal protection of the laws.

ARGUMENT

I. THE DENIAL OF BLOOD GROUPING TESTS TO A DEFENDANT IN A PATERNITY PROCEEDING SOLELY BECAUSE OF HIS INDIGENCY VIOLATES THE DUE PROCESS CLAUSE.

The novelty of the constitutional issue presented by this case should not obscure the palpable injustice that the appellant has suffered. The State of Connecticut caused Walter Little to be summoned into court where he was

required to prove that he was not the biological father of Kenyatta Streater.[11] He had a single realistic means of defending himself. A standard laboratory test, that scientifically and conclusively exonerates more than 90% of all falsely accused putative fathers, was readily available. The test, however, cost $250, and Walter Little had nothing. He was, moreover, precluded from raising this modest fee because he was incarcerated by the very State that was haling him into court. His request that the State pay for the test was denied. The test remained tantalizingly out of reach. The court thereafter pronounced him a parent, with all of the responsibilities that that status entails, and pronounced Kenyatta Streater the daughter of a criminal, solely on the basis of conflicting testimonial evidence. This procedure did not comport with the fundamental requirements of the Fourteenth Amendment.

A. The unique importance of blood grouping tests in paternity litigation.

The fundamental unfairness involved in the denial of blood grouping tests to an indigent putative father results from the unique importance of those tests in paternity litigation and from the special characteristics of paternity proceedings that distinguish them from garden variety civil actions. A proper appreciation of the importance of blood tests requires a brief description of their nature and history.

Inherited characteristics have doubless been used in the determination of paternity since ancient times, and judicial references to the genetic knowledge of the day date back

[11]Appellant's evidentiary burden is discussed at pp. 30-32, *infra*.

almost two centuries. *See Commissioners of Almshouse v. Whistelo,* 3 Wheeler's Crim. Cas. 194, 235 (N.Y. Gen. Sess. 1808). The discovery of human blood groups by Karl Landsteiner in Vienna at the beginning of this century, for which he received the 1930 Nobel Prize for Medicine, ultimately made it possible to scientifically exonerate innocent putative fathers on a wholesale basis.

Landsteiner's announcement in 1901 that human blood could be classified into three distinct groups (a fourth group was discovered in 1902) explained the hitherto unintelligible disasters that had previously resulted from attempted blood transfusions. Although it did not occur to Landsteiner at the time that serological propeties might be inherited, their application to paternity problems was recognized by two of his German colleagues in 1911. The first theory of heredity of the classical blood groups was mathematically revised in 1924. It thus became possible to scientifically prove that a given man could not possibly be the father of a given child. Thereafter, nothing stood in the way of applying blood tests in paternity actions. P. Speiser & F. Smekal, *Karl Landsteiner,* 91-93 (1975).

Courts in Europe were quick to utilize this opportunity to scientifically exclude innocent putative fathers. Blood tests were used in more than 5000 legal actions in Germany alone between 1924 and 1929. Schiff, *The Medico Legal Significance of Blood Groups,* 217 The Lancet 921, 921-22 (1929). Courts in Austria, Scandinavia, and Italy soon followed. L. Lattes, *Individuality of the Blood in Biology and in Clinical and Forensic Medicine* 253-54 (rev. ed. 1932).

Courts in this country responded somewhat more slowly. Although a putative father was exonerated by a blood test in *Commonwealth v. Zammarelli,* 17 Pa. D.&C. 229 (1931),

a well-reasoned New York decision ordering such a test was reversed on appeal. *Beuschel v. Manowitz,* 151 Misc. 899, 271 N.Y.S. 277, *rev'd per curiam,* 241 App. Div. 888, 272 N.Y.S. 165, *motion for leave to appeal denied,* 265 N.Y. 509, 193 N.E. 295 (1934). The New York Legislature, however, quickly passed a series of laws authorizing courts to order blood grouping tests in a variety of legal disputes, 1935 N.Y. Laws chs. 196-98, and an irreversible evidentiary trend had begun. The Connecticut courts were, ironically, among the first to recognize the evidential value of blood tests in paternity cases. *See, Domonkos ex rel. Herman v. Rotundo,* 4 Conn. Supp. 29 (C.P. 1936). In 1936, the Supreme Court of South Dakota became the first state court of highest jurisdiction to acknowledge the usefulness of blood tests in the judicial truthseeking function. *State v. Damm,* 64 S.D. 309, 266 N.W. 667 (1936).

Judicial acceptance of the reliability of blood grouping tests in excluding the paternity of innocent putative fathers is now, for all practical purposes, complete and universal. The most prolific commentator on paternity litigation has noted:

> As far as the accuracy, reliability, dependability - even infallibility - of the test are concerned, there is no longer any controversy. The result of the test is universally accepted by distinguished scientific and medical authority. There is, in fact, no living authority of repute, medical or legal, who may be cited adversely. . . .
>
> [T]here is now. . .practically universal and ananimous judicial willingness to give decisive and controlling evidentiary weight to a blood test exclusion of paternity.

1 S. Schatkin, *Disputed Paternity Proceedings* §9.13 at 9-38-40 (rev. ed. 1979).

As judicial acceptance of blood grouping tests has grown, the tests themselves have become capable of exonerating a

steadily increasing percentage of innocent putative fathers. A few years ago a falsely accused man had only a 50-55% chance of scientifically proving his nonpaternity. *See State v. Fowler,* 277 N.C. 305, 308, 177 S.E. 2d 385, 387 (1970); McCormick's *Law of Evidence* § 211 at 519 (2d ed. 1972).[12] Those statistics are now ancient history. There has, in recent years, been a scientific "revolution" in the use of blood group systems in cases of disputed paternity as a result of the introduction of the HLA (for human, leukocyte, antigen) system of testing. Terasaki, *Resolution by HLA Testing of 1000 Paternity Cases Not Excluded by ABO Testing,* 16 J.Fam.L. 543 (1978).

Whereas previous tests were based on red blood cell groupings, the HLA test is based on tissue typing of the white blood cells. *See Cramer v. Morrison,* 88 Cal. App. 3d 873, 877-78, 153 Cal.Rpotr. 865, 867 (1979) (discussing Dr. Terasaki's trial testimony). It is readily available, reasonably inexpensive, and dramatically effective. It conclusively excludes *91%* of falsely accused putative fathers, in the case of blacks,[13] and *93%* in the case of whites. Krause, *Joint AMA-ABA Guidelines: Present Status of Serological Testing in Problems of Disputed Parentage,* 10 Fam.L.Q. 247, 258 Table 3 (1976). *Accord, Hepfel v. Bashaw,* 279 N.W. 2d 342, 347 (Minn. 1979); *State ex rel. Ortloff v. Hanson,* 277 N.W.2d 205, 207 (Minn. 1979); *Lascaris v. Lardeo,* 100 Misc. 2d 220, 222, 417 N.Y.S. 2d665, 666 (1979). This effectiveness is sufficiently great to distinguish modern blood

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[12]The Appellate Session of the Superior Court of Connecticut has grounded its recent blood test decisions on this badly outdated factual assumption. *Ferro v. Morgan,* 35 Conn. Supp. 679, 685, 406 A.2d 873, 877, *cert. denied,* 177 Conn. 753, 399 A.2d 526 (1979).

[13]Both of the named parties in the instant case are black.

grouping tests from virtually all other conceivable items of potentially exculpatory evidence and to make the denial of those tests to indigent putative fathers an injustice of constitutional proportions.

The availability of this scientific evidence is crucial in paternity litigation because testimonial evidence in such proceedings is inherently susceptible to doubt. In a series of recent cases involving discriminations against illegitimate children, this Court has repeatedly noted the peculiar difficulties involved in proving the paternity of such children. *Parham v. Hughes,* 441 U.S. 347, 355 (1979) (plurality opinion); *id.* at 360 (Powell, J. concurring); *Lalli v. Lalli,* 439 U.S. 259, 268-69 (1978) (plurality opinion); *Trimble v. Gordon,* 430 U.S. 762, 772 (1977); *Gomez v. Perez,* 409 U.S. 535, 538 (1973). *See Caban v. Mohammed,* 441 U.S. 380, 405 (1979) (Stevens, J. dissenting); *Stanley v. Illinois,* 405 U.S. 645, 665 (1972) (Burger, C.J. dissenting). Perhaps the best judicial expression of these difficulties of proof was written by Justice Brennan when he sat on the Appellate Division of the New Jersey Superior Court:

> [I]n the field of contested paternity. . .the truth is so often obscured because social pressures create a conspiracy of silence or, worse, induce deliberate falsity.
>
> The value of blood tests as a wholesome aid in the quest for truth in the administration of justice in these matters cannot be gainsaid in this day.

Cortese v. Cortese, 10 N.J. Super. 152, 156, 76 A.2d 717, 719 (1950).

Testimony from accurate or reliable eye-witnesses is rarely available in paternity cases since the sexual activities at issue "usually take place in intimate and private surroundings, and the self-serving testimony of a party is of questionable reliability." Larson, *Blood Test Exclusion Procedures in*

Paternity Litigation: The Uniform Acts and Beyond, 13 J.Fam.L. 713, 713 (1974). The peculiar unreliability of testimonial evidence in paternity actions is a particularly grave matter because every scientific study done on the matter indicates that a very large number of defendants in such proceedings have been falsely accused.

The advent of blood grouping tests has made it possible to measure the percentage of innocent putative fathers with some precision In 5500 paternity actions litigated in Europe in the 1920's blood tests exonerated defendants in 8% of the cases. Since the blood tests of that day were incapable of excluding more than 16% of all innocent putative fathers, the first scientific commentator observed that "roughly *every second man had been denounced unjustly.*" Schiff, *The Medico legal Significance of Blood Groups,* 217 *The Lancet* 921, 922 (1929) (emphasis added). A later study of 6655 paternity cases in several European countries also concluded that "[H]alf of the defendants in these cases were falsely accused." A. Weiner, *Blood Groups and Transfusion* 383 (3d ed. 1943). Studies in this country have reached similar conclusions. One survey of 1000 disputed paternity cases in New York City in which blood tests were used showed that 39.6% of men denying paternity were falsely accused. Sussman, *Blood Grouping Tests,* 40 Am.J.Clinical Pathology 38,38 (1963).[14] For the results of other blood test studies yielding similar statistical results *see* 1 S. Schatkin,

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[14]Perhaps even more disturbing, a companion study demonstrated that 18% of paternity defendants who *admitted* paternity "were not the fathers of the children they accepted as their offspring." Sussman, *Blood Grouping Tests,* 40 Am.J. Clinical Pathology 38, 39-40 (1963).

Disputed Paternity Proceedings, § § 9.05-9.09 at 9-12-26 (rev. ed. 1979).[15]

Scientific evidence is typically superior to testimonial evidence for a number of obvious reasons. But the gulf that yawns between modern blood test evidence on the one hand and the self-serving testimony of parties on the other in paternity litigation is vast beyond compare. We do not suggest, of course, that it is impossible for a factfinder in a paternity case to arrive at the correct result by hearing testimony. In some cases it will be obvious who is telling the truth and who is not; in others the correct result may be arrived at by what is more or less a guess. We do suggest, however, that false testimony and innocent defendants are commonplace in paternity proceedings and that, in the absence of blood test evidence, it is inevitable that innocent men will be convicted with an intolerable regularity.

The denial of this crucial evidence to indigent defendants typically deprives them of the only persuasive evidence they could possibly present in court, and thereby renders the

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[15]Lie detector studies have yielded similar results. A six year study of disputed paternity cases in Chicago, in which the parties submitted to polygraph tests following their courtroom testimony, showed that "93 percent of the tested parties lied in some respect when they testified in court as to their sexual relationship," and that in over 47% of the cases the complainant "was reported lying when she denied having intercourse with anyone else but the defendant during the conception period. In the great majority of cases the lying mother confessed to the lie-detector examiner that she had lied in court." Arther & Reid, *Utilizing the Lie Detector Technique to Determine the Truth in Disputed Paternity Cases,* 45 J.Crim.L., Criminology & Police Sci. 213, 215, 217 (1954).

Such statistical evidence corroborates the frequently cited remarks of Lord Merthyr in the House of Lords. "In my experience of these cases, apart from one other class - namely, fish-poaching cases - there is no class of case in which there is a greater degree of perjury in the courts." 229 Parl.Deb.H.L. (5th ser.) 1090 (1961).

resulting judgmental process infinitely more capricious. These factual considerations, combined with the distinctive *legal* characteristics of paternity proceedings discussed *infra,* bring the injustice worked upon Walter Little to the heart of the historic concerns of the Fourteenth Amendment.

B. The Requirements of the Due Process Clause.

Nothing is more remarkable in this case than the almost total isolation of Connecticut law. The only State other than Connecticut that requires all defendants in paternity proceedings, irrespective of means, to pay for blood grouping tests in advance of trial or otherwise do without such evidence altogether is North Carolina.[16] The vast majority of American jurisdictions, either expressly or by implication, provide some mechanism giving indigent putative fathers access to blood tests.[17] The constitutional ruling of the court below in

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[16]*See* N.C.Gen.Stat. § 8-50.1 (Supp. 1979).

[17]Twenty-five states and the District of Columbia expressly allow the costs of such tests to be charged to the State, county, municipality, or a public agency. Of these, nineteen states and the District of Columbia do so by statute. Ala. Code tit. 26 § 12-5 (1977); Ark. Stat.Ann. § 34-705.1 (1962); Cal. Evid. Code § 894 (Deering 1966), *see B. v. Superior Court,* 86 Cal. App. 3d 1006, 150 Cal.Rptr. 586 (1978); Haw.Rev.Stat. § 584-16 (1976); Idaho Code § 7-1117 (1979); Ill. Rev.Stat. ch.106 3/4 § 3 (Supp. 1980-81); Kan. Stat. § 23-132 (1974) (the fees are subsequently taxed as costs); La. Rev. Stat. Ann. § 9:397.1 (West Supp. 1980); Md. Ann. Code art. 16 § 66G (Supp. 1980); Mich. Stat. Ann. § 25.496(c) (1974); 1980 Minn. Sess. Law Serv. ch. 589 § 19 (West) (to be codified as Minn. Stat. § 257.69); N.H. Rev. Stat. Ann. § 522.3 (1974); N.Y. Fam. Ct. Act § 532 (McKinney Supp. 1976-79), *see People ex rel. Van Epps v. Doherty,* 261 App. Div. 86, 24 N.Y.S. 2d 821 (1941); N.D. Cent. Code § 14-17-15 (Supp. 1977); Or. Rev. Stat. § 109.256 (1979); 42 Pa. Cons. Stat. Ann. § 6132 (Purdon Supp. 1980); Tex. Fam. Code Ann. § 13.03 (Vernon Supp. 1980) (if the Texas Department of Human Resources "is a party of the suit"); Utah Code

(continued)

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Ann. §78-25-23 (1977); Wis. Stat. Ann. §52.36 (2) (West Supp. 1980-81) (the fees are subsequently taxes as costs); 16 D.C. Code §2343 (1973). The Supreme Courts of Colorado, Massachusetts, and West Virginia have held payment by the State to be constitutionally required. *Franklin v. District Court,* 194 Colo. 189, 571 P.2d 1072 (1977), *commonwealth v. Possehl,* 355 Mass. 575, 246 N.E.2d 667 (1969); *State ex rel. Graves v. Daugherty,* 266 S.E.2d 142 (W.Va. 1980). Such tests are judicially charged to the State in New Jersey by the inherent power of the courts in that State. *Smith v. Walker,* 138 N.J.Super. 187, 350 A.2d 319 (1975). Such tests are charged to the State in Kentucky by virtue of Ky.Op. Att'y Gen. 65-391. In Indiana, it is the policy of the Department of Public Welfare to pay for blood tests where the prosecuting attorney requests such a test or where the parties stipulate that the test results will be admitted into evidence. Letter from Thomas W. McKean, Director, Indiana Child Support Division, Department of Public Welfare to IV-D Deputy Prosecuting Attorneys (December 4, 1979) (unpublished letter on file in the office of appellant's attorney).

In addition, the statutes of five states give the courts of those states unlimited power to determine how and by whom such costs shall be paid. Me. Rev. Stat. tit. 19§279 (Supp. 1980-81); Miss. Code Ann. §93-9-25 (1972); Nev. Rev. Stat. §56. 020 (1979); Ohio Rev. Code Ann. §3111.16 (Baldwin 1976); R.I. Gen. Laws §15-8-13 (Supp. 1980). These statutes clearly provide local courts with the necessary authority to order that such costs be paid by the state where one or both of the parties are indigent. Ohio courts have not, however, been in agreement on whether that state should be charged in cases involving indigent defendants. *Compare Walker v. Stokes,* 45 Ohio App.2d 275, 344 N.E.2d 159 (1975) (holding such payment to be constitutionally required) *with Bigsby v. Bates,* 59 Ohio Misc. 51, 391 N.E.2d 1384 (C.P. 1978) (holding free blood tests not required in light of *Walker v. Stokes,* 54 Ohio App.2d 119, 375 N.E.2d 1258 (1977) (stripping state of its power to jail for nonsupport).

Somewhat more ambiguously, the statutes of five more states simply provide that local courts "may" in their discretion, order such costs to be paid by the parties. Ga. Code §74-311 (Supp. 1980); Tenn. Code Ann. §24-716 (Supp. 1979); Va. Code §20-61.2 (Supp. 1980); Wash. Rev. Code Ann. §26.26.140 (Supp. 1980-81); Wyo. Stat. §14-2-114 (1978). These statutes appear to provide local courts with at least some authority to charge such costs to the state where one or both of the parties are indigent.

the instant case is no less idiosyncratic. *Every* state appellate court outside of Connecticut that has considered the issue has concluded that putative fathers may *not* constitutionally be denied access to blood tests on the basis of indigency. *Franklin v. District Court,* 194 Colo. 189, 571 P.2d 1072 (1977); *Commonwealth v. Possehl,* 355 Mass. 575, 246 N.E.2d 667 (1969); *Walker v. Stokes,* 45 Ohio App. 2d 275, 344 N.E.2d 159 (1975); *State ex rel. Graves v. Daugherty,* 266 S.E 2d 142 (W.Va. 1980).[18] A consideration of the

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Although the relevant statutes in Alaska are unclear, courts in that State would, in all probability, order such payment by virtue of *Reynolds v. Kimmons,* 569 P.2d 799 (Alas. 1977) (holding that indigent putative fathers have a due process right to counsel where the complainant is represented by the State). In Nebraska, a District Court judge ordered the costs of blood tests to be paid from public funds in an illegitimacy case remanded by the Supreme Court of Nebraska in *Ford v. Ford,* 191 Neb. 548, 216 N.W.2d 176 (1974). *Ford v. Ford,* Doc. 655, No. 275 (Dist. Ct. Douglas Cty. Neb. Feb. 21, 1975). The laws of the remaining eleven States (Arizona, Delaware, Florida, Iowa, Missouri, Montana, New Mexico, Oklahoma, South Carolina, South Dakota, and Vermont) are unclear.

[18]A Family Court judge in New York has also reached this conclusion in a particularly well-reasoned opinion. *Lascaris v. Lardeo,* 100 Misc.2d 220, 417 N.Y.S. 2d 665 (Fam.Ct. 1979). *See Reynolds v. Kimmons,* 569 P.2d 779 (Alas. 1977), and *G. v. R.,* 95 Misc. 2d 273, 407 N.Y.S. 2d 414 (Fam. Ct. 1978) (giving indigent putative fathers the constitutional right to counsel). *Cf. M. ex rel. T. v. S.,* 169 N.J. Super. 209, 404 A.2d 653 (1979); *Lurry v. Mills,* 152 N.J. Super. 127, 377 A.2d 804 (1977); *Smith v. Walker,* 138 N.J. Super. 187, 350 A.2d 319 (1975) (giving indigent putative fathers the right to a blood test by virtue of the inherent powers of the New Jersey courts but drawing extensively on constitutional precedent and reasoning).

This single exception to this unbroken line of cases in other states is *Bigsby v. Bates,* 59 Ohio Misc. 51, 391 N.E.2d 1384 (C.P. 1978), holding that free blood tests are not required in Ohio in light of *Walker v. Stokes,* 54 Ohio App. 2d 119, 375 N.E. 2d 1258 (1977) (stripping Ohio of its power to jail for non-support). Because *Bigsby* is merely a memorandum of a single trial judge its authority is limited even in Ohio. It plainly has no relevance to states such as Connecticut which retain full power to jail for nonsupport. *See* Conn.Gen.Stat. § § 46b-215, 53-304 (1979).

fundamental requirements of the Due Process Clause and of the distinctive legal characteristics of paternity proceedings, makes it clear that the profound isolation of Connecticut law on this issue is eminently deserved.

We start with the proposition that the fact that a man is haled into court as a civil, as distinct from a criminal, defendant does not wholly strip him of basic constitutional protections. He has an indubitable right to be heard. Daniel Webster argued in the *Dartmouth College* case that "the law of the land" is "a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial." *Trustees of Dartmouth College v. Woodward,* 17 U.S. (4 Wheat.) 518, 581 (1819). This Court noted well before the Civil War that in our jurisprudence "no man shall be condemned in his person or property without . . . an opportunity to make his defense," *Boswell's Lessee v. Otis,* 50 U.S. (9 How.) 336, 350 (1850), and repeated this observation a number of times before finally giving it constitutional significance in *Hovey v. Elliott,* 167 U.S. 409, 45, 444 (1897). *See Windsor v. McVeigh,* 93 U.S. 274, 277 (1876); *Baldwin v. Hale,* 68 U.S. (1 Wall.) 223, 233 (1864); *Nations v. Johnson,* 65 U.S. (24 How.) 195, 203 (1861).

This fundamental theme has continually recurred in this century.[19] This Court stated in *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 313 (1950), that:

> Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.

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[19]*See Boddie v. Connecticut,* 401 U.S. 371, 377-78 n.3 (1971).

In a perhaps even more celebrated statement, this Court declared in *Boddie v. Connecticut,* 401 U.S. 371, 377 (1971), a case involving civil *plaintiffs,* that "[D]ue process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard."

Boddie was, of course, concerned with a class of litigants (in that case, would-be divorce plaintiffs) who were literally excluded from the courtroom by a filing fee, just as the defendants in *Hovey, Windsor,* and *Baldwin* had been totally denied an opportunity to appear in cases involving their property interests. But although the physical opportunity to appear in the courtroom, without more, doubtless satisfies the notice and hearing requirements of the Due Process Clause in the typical civil case, it does not follow that such an opportunity, in and of itself, necessarily satisfies those requirements in every case. This Court has, by way of analogy, never been satisfied with the mere assertion of notice. Rather, it has assiduously scrutinized forms of notice to ensure that such notice is *meaningful. Mullane* is a well-known example of this scrutiny; other examples stretch back to *Nations* and *Boswell's Lessee.*

This Court's pronouncements in *Mullane* and *Boddie* similarly indicate that the requirement of the Due Process Clause that civil defendants be granted an opportunity to appear has a qualitative aspect and is not in every case satisfied by the mere form of a hearing. *Mullane*'s language, if not its holding, indicates that there must be an "opportunity for hearing *appropriate to the nature of the case*," 339 U.S. at 313 (emphasis added). *Boddie* emphatically states that there must be a *meaningful* opportunity to be heard," 401 U.S. at

377 (emphasis added). It is implicit in these pronouncements that in limited circumstances, where the outcome of a nominally civil action is particularly consequential, this court has reserved the power to scrutinize the hearing given an involuntary litigant to ensure that it is, in some fundamental sense, meaningful. It is our contention that, if a defendant in a paternity proceeding is, solely because of indigency, denied an otherwise readily available laboratory test that conclusively exonerates more than 90% of all innocent defendants, he has been denied a meaningful hearing in the constitutional sense of that term.

The denial of a blood test under these circumstances is the denial of a meaningful hearing in part because the resulting suppression of such an overwhelmingly probative item of evidence will inevitably "impede unacceptably the truth-finding functions of judge and jury." *United States v. Payner,* 100 S.Ct. 2439, 2445-46 (1980). *Payner* is only the most recent example of this Court's repeated concern for accuracy in the judicial process. In a series of cases involving the fourth Amendment this Court has given constitutional significance to the jurisprudential notion that adjudications of fact should be grounded "on the basis of all the evidence which exposes the truth." *Alderman v. United States,* 394 U.S. 165, 175 (1969). *See Rakas v. Illinois,* 439 U.S. 128, 137 (1978); *United States v. Ceccolini,* 435 U.S. 268, 276 (1978); *Stone v. Powell,* 428 U.S. 465, 490 (1976).

There is, thus, a "strong interest under any system of justice of making available to the trier of fact all concededly relevant and trustworthy evidence which either party seeks to adduce." *Michigan v. Tucker,* 417 U.S. 433, 450 (1974). This interest is in part philosophical. "The end of litigation is justice. Knowledge of the truth is essential thereto." *Union*

Pacific Railway v. Botsford, 141 U.S. 250, 258 (1891) (Brewer, J. dissenting).[20] There is also a more pragmatic strain to this interest. If the courts of this country either directly or indirectly suppress highly probative evidence and proceed on the basis of infinitely less reliable evidence to render factual adjudications the accuracy of which is open to obvious doubt, what this Court has called "the moral force" of the law, *In re Winship,* 397 U.S. 358, 364 (1970), will be ineluctably diluted. Such a deflection of "the truthfinding process. . .may well have the. . . effect of generating disrespect for the law and the administration of justice." *Stone v. Powell, supra,* 428 U.S. at 490-91.

These considerations have historically been at the heart of judicial rulings concerning blood tests. The first appellate decision affirming the reliability of blood tests declared that "The primary function of the judiciary is the administration of justice, and justice can never be rightly administered unless truth be first ascertained as nearly as may be." *State v. Damm,* 64 S.D. 309, 316, 266 N.W. 667, 670 (1936). As noted, *supra,* Justice Brennan as a state appellate judge spoke of blood grouping tests as "a wholesome aid in the quest for truth in the administration of justice." *Cortese v. Cortese,* 10 N.J. Super. 152, 156, 76 A.2d 717, 719 (1950). It is particularly important that when this Court considered the somewhat different blood tests at issue in *Schmerber v. California,* 384 U.S. 757 (1966), and *Breithaupt v. Abram,* 352 U.S. 432 (1957), it upheld them in large part on these grounds. Society, the Court stated in *Breithaupt,* has an interest "in the scientific determination of intoxication. . . .

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[20] "Our goals are truth and justice, and procedures are but means to these ends." Oaks, *Ethics, Morality, and Professional Responsibility,* 1975 B.Y.U. L.Rev. 591, 596 (1975).

And the more so since the test. . .may establish innocence, thus affording protection against the treachery of judgment based on one or more of the senses." 352 U.S. at 439.

There are obvious and necessary limits on this Court's power to ensure that judicial proceedings are meaningful and accurate in fact. The decisions of this Court cannot bestow our society with the resources to provide, for example, counsel and expert witnesses to uncounted numbers of civil litigants. Such accounterments are, in any event, typically marginally helpful rather than absolutely crucial to the accurate adjudication of fact. The denial of readily available blood tests to indigent putative fathers is, however, a quite different matter. This denial is at once the deprivation of an indispensible and irreplacable opportunity of exoneration and an injustice readily correctible by this Court at an almost pitifully modest cost to society.[21] Justice Frankfurter suggested a like distinction in the *Griffin* case:

> Law addresses itself to actualities. . . Of course a State need not equalize economic conditions. A man of means may be able to afford the retention of an expensive, able counsel not within reach of a poor man's purse. Those are contingencies of life which are hardly within the power, let alone the duty, of a State to correct, or cushion. But when a State deems it wise and just that convictions be susceptible to review by an appellate court, it cannot by force of its exactions draw a line which precludes convicted indigent persons, forsooth erroneously convicted, from securing such a review merely by disabling them from bringing to the

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[21]In this respect, it is important to note that a provision by the State of blood tests to indigent putative fathers in advance of trial need not be a gratuitous subsidy. The cost of the test could be taxed as costs to the losing party. *See* Kan. Stat. §23-132 (1974); Wis. Stat. Ann. §52.36(2) (West Supp. 1980-81).

> notice of an appellate tribunal errors of the trial court which would upset the conviction were practical opportunity for review not foreclosed.

Griffin v. Illinois, 351 U.S. 12, 23 (1956) (Frankfurter, J. concurring).

Similarly where a standardized, universally recognized laboratory test that conclusively establishes nonpaternity in more than 90% of all cases involving falsely accused defendants is readily available, the State may not disable indigent defendants, forsooth innocent, from bringing this evidence to the notice of the trial court. Without this evidence, the indigent defendant is placed in a swearing contest[22] with the plaintiff in which the judge[23] must, often desperately, rely on his subjective instincts, rather than hard scientific data, as to which witness is telling the truth. This denial of evidence obviously robbed the hearing below of a great deal of meaning. Had this not been a paternity action, the hearing might well have remained *constitutionally* meaningful. But, in this case, considerations arising from the unique legal character of paternity litigation and the circumstances of the defendant collectively require an unusually stringent standard of judicial review, which, if exercised, must necessarily conclude that the denial of a blood test made the proceedings below unmeaningful in a constitutional sense.

First. This action involves the denial of an essential item of evidence to a *defendant.* This Court has drawn a constitutional distinction between the rights accorded persons involuntarily " 'haled into court' by the State" and

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[22]In Connecticut, moreover, this swearing contest is one that is heavily biased in favor of the plaintiff. *See* pp. 30-32, *infra.*

[23]Not, in Connecticut, a jury. *See* n.7, *supra.*

voluntary litigants seeking to use rights as a sword rather than a shielf. *Ross v. Moffitt,* 417 U.S. 600, 610-11 (1974). *Boddie v. Connecticut* recognized that the principles of due process enunciated by this Court over the years have typically concerned the "rights of defendants compelled to litigate their differences in the judicial forum." 401 U.S. at 785. The truly novel feature of *Boddie* was its extension of those rights to a class of civil plaintiffs on the basis of the State's monopoly of divorce adjudication. The appellant in the instant case need not, of course, be analogized to a defendant; he *is* a defendant.

This obvious fact serves to readily distinguish the instant case from *United States v. Kras,* 409 U.S. 434 (1973) (refusing to waive filing fees to an indigent petitioner in bankruptcy), and *Ortwein v. Schwab,* 410 U.S. 656 (1973) (refusing to waive filing fees to an indigent wishing to appeal a denial of welfare benefits). *Ortwein* and *Kras* were grounded on "the existence of alternatives. . . to the judicial remedy" available to the litigants in those cases. *Ortwein, supra,* 410 U.S. at 659. In contrast, "the utter exclusiveness of court access and court remedy. . . was a potent factor in *Boddie*." *Kras, supra,* 409 U.S. at 445. The appellant here did not choose to file a legal action as one of several available paths to relief. Rather, the State caused the appellee to summon him to court against his will. His presence in court was wholly involuntarily, and he is entitled to all of the due process protections traditionally accorded to involuntary litigants.

Second. In Connecticut, as in most states, a losing defendant in a paternity proceeding becomes subject to a number of potential criminal and quasi-criminal sanctions not present in the ordinary civil case.[24] The appellant here

[24]The perhaps unparalleled absence of such sanctions in Ohio was the basis of the memorandum decision in *Bigsby v. Bates,* discussed in n.18, *supra.*

has, of course, already been found liable for thousands of dollars in support payments and is additionally obligated to provide support for the child in question for the duration of her minority. Conn.Gen.Stat. §46b-215(a) (1979). Should he subsequentily fail to comply with any support order he will be subject to imprisonment for contempt of court. *Id.*

Even more seriously, appellant will further be subject to criminal prosecution and imprisonment for nonsupport. Conn.Gen.Stat. §53-304(a) provides that:

> Any person who neglects or refuses to furnish reasonably necessary support to his. . . child under the age of eighteen. . . shall be deemed guilty of nonsupport and shall be imprisoned not more than one year, unless he shows to the court. . . that, owning to physical incapacity or other good cause, he is unable to furnish such support. . . . [T]he term "child" shall include one born out of wedlock whose father. . . has been adjudged the father by a court of competent jurisdiction.

While §53-304 as a criminal statute requires proof beyond a reasonable doubt of each of the elements of nonsupport, the statute makes it clear that the issue of paternity itself, once adjudicated in a paternity proceeding, is *res judicata* and cannot be relitigated.

The initial paternity proceeding, therefore, has inescapable criminal overtones. This characteristic renders the action quasi-criminal in nature[25] and has been influential in

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[25]Although the Supreme Court of Connecticut characterized paternity proceedings as "civil" rather than "criminal" in *Robertson v. Apuzzo,* n.7 *supra,* such an adroit act of pigeonholing erases neither the existence of the criminal sanctions discussed in the text nor the fact that these sanctions are not involved in the ordinary civil case. *Cf. Smith v. Bennett,* 365 U.S. 708, 712 (1961) ("The availability of a procedure to regain liberty lost through criminal process cannot be made contingent upon a choice of labels"). It is, of course, implicit in our entire argument that paternity proceedings are demonstrably different from garden-variety civil litigation and that the civil/criminal distinction is therefore hardly talismanic.

persuading a number of state courts that the denial of blood tests in such an action is inconsistent with the dictates of the Fourteenth Amendment. *See Franklin v. District Court,* 194 Colo. 189, 191 n.1, 571 P.2d 1072, 1074 n.1 (1977); *Walker v. Stokes,* 45 Ohio App. 2d 275, 278, 344 N.E. 2d 159, 161 (1975); *State ex rel. Graves v. Daugherty,* 266 S.E. 2d 142, 146 (W.Va. 1980). But in any event, regardless of labels, the proceeding below implicated appellant's liberty, as well as property, interests, and therefore warrants an appropriately elevated level of scrutiny.

Third. Although the instant case is nominally a private affair, it is in fact a case in which the full power of the *State* has been brought against an indigent defendant in a judicial proceeding. In the first place, of course, the proceeding below was conducted in a state court and affirmed by a state appellate tribunal. "The judicial action. . . bears the clear and unmistakable imprimatur of the State." *Shelley v. Kraemer,* 334 U.S. 1, 20 (1948). The State, moreover, lurks in the background of every paternity proceeding in Connecticut by virtue of the potential criminal and contempt sanctions discussed *supra.* But the State is much more directly involved in the instant case. Since appellee is a recipient of public assistance, the decision to summon appellant into court was made not by her but by the Connecticut Department of Social Services. That Department referred this case to appellee's eventual attorney "for prosecution" (J.A. 10). The State not only paid that attorney some $300 to prosecute appellant (J.A. 20) but is the actual recipient of the several thousand dollars of support money awarded by the trial court (J.A. 21).

This procedure is, in fact, mandated by both state and federal law. Conn.Gen.Stat. §46b-169(a) (1979) compels the mother of any child born out of wedlock to disclose the

nameof the child's putative father to the welfare authorities if the child is a recipient of public assistance.[26] That statute further compels her "to institute an action to establish the paternity of said child." Connecticut's requirement is, furthermore, mandated by 42 U.S.C. §654 (4) (1976), which requires the States "to establish the paternity" of illegitimate children receiving AFDC payments and "to secure support for such child from his parents."[27] *See* 45 C.F.R. §232.12 (1979). Because of these requirements, state action has been institutionalized in paternity proceedings involving recipients of public assistance.

It has been clear since the *Civil Rights Cases,* 109 U.S. 3 (1883), that the abrogation and denial of rights by the States "was the great seminal and fundamental wrong which was intended to be remedied" by the Fourteenth Amendment. *Id.* at 18. But as this Court has also observed, "Conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action." *Evans v. Newton,* 382 U.S. 296, 299 (1966). *See Burton v. Wilmington Parking Authority,* 365 U.S. 715 (1961). Such "state action" permeated the entire proceeding in the instant case. Because

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[26]The constitutionality of this disclosure requirement has been twice before this Court but was left unresolved by the Court on both occasions. *Maher v. Doe,* 432 U.S. 526 (1977); *Roe v. Norton,* 422 U.S. 391 (1975).

[27]Although Connecticut's statutory requirement, originally enacted by 1971 Conn.Pub.Acts. No. 439 §4, predates the federal one, enacted as part of the Social Services Amendments of 1974, 88 Stat. 2337, 2359-60, the federal statute has now largely preempted the field, and Connecticut is no longer free to significantly alter its requirement. "[V]ery little area is left open for state action." *Doe v. Maher,* 414 F.Supp. 1368, 1378 (D.Conn. 1976), *vacated,* 432 U.S. 526 (1977).

of this undeniable fact, the legal actions of the appellee, nominally a private citizen, were essentially the actions of the State for purposes of the Fouirteenth Amendment.[28]

Fourth. It is of particular significance in this case that the reason that Walter Little was so poor as to be unable to afford a modest laboratory fee was that he was incarcerated by the very State that was simultaneosly expending the necessary funds to hale him into court. This incarceration, of course, rendered him indigent beyond peradventure. Physically cut off by the State from any opportunity of employment, the small sums that were within the "able-bodied reach" of the petitioner in bankruptcy in *United State sv. Kras,* 409 U.S. 434, 449 (1973), were beyond the wildest dreams of the appellant in this case. He quite simply had no ability to present any defense requiring any expenditure of funds whatsoever. *See Klapprott v. United States,* 335 U.S. 601, 614 (1949) (plurality opinion).

While the States are, of course, free to imprison persons in punishment for crime, the litigational disabilities that inevitably attend incarceration impose some corresponding responsibilities on the incarcerating authorities. This Court has long prohibited prison officials from physically impeding their charges from sending petitions to the Courts. *Cochran v. Kansas,* 316 U.S. 255 (1942); *Ex parte Hull,* 312 U.S. 546 (1941). The Court has, however, also acknowledged the

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[28]*See G.v. R.*, 95 Misc. 2d 273, 275-76, 407 N.Y.S. 2d 414, 416 (Fam.Ct. 1978). The facts of this case make it unnecessary for the Court to decide the much more difficult question of whether an indigent defendant in a paternity proceeding brought by a plaintiff unassisted by the State is also constitutionally entitled to a blood test. We note, however, that this latter problem is much more academic than real since few if any private individuals, as distinct from the State, will choose to retain counsel and pay the necessary court fees to bring a lawsuit against an indigent.

fact that, for an incarcerated person, mere physical access to the Courts, without more, is often constitutionally insufficient. Thus, in *Johnson v. Avery,* 393 U.S. 483 (1969), the Court held that, in the absence of some viable alternative, the States may not prohibit "jailhouse lawyers" from assisting their fellow inmates in the preparation of petitions for habeas corpus relief. In doing so, the Court recognized that "In the case of all except those who are able to help themselves. . . the prisoner is, in effect, denied access to the courts unless such help is available." 393 U.S. at 488.

But this Court has also required the States to shoulder *affirmative* responsibilities to offset the litigational difficulties necessarily confronting prisoners.[29] In *Bounds v. Smith,* 430 U.S. 817 (1977), the Court held that, in the absence of some reasonable alternative, state prison officials must provide their charges with adequate law libraries. The Court emphatically stated that it will require "remedial measures to insure that inmate access to the courts is adequate, effective, and meaningful." *Id.* at 822. But just as the physical ability to communicate with the courts is often unmeaningful to prisoners who lack all access to legal materials, physical presence in court will sometimes be unavailing if a prisoner defendant lacks all access to the only effective evidence that he could possibly produce. It follows from *Bounds* that, if the States choose to litigate against their prisoners, this Court should scrutinize the hearings given those inmates to ensure that, in some fundamental sense, they are "adequate, effective, and meaningful."

Fifth. The factors of involuntariness, potential criminal

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[29]*Cf. Estelle v. Gamble,* 429 U.S. 97, 103 (1976) (establishing "the government's obligation to provide medical care for those whom it is punishing by incarceration").

sanctions, state action, and an incarcerated defendant, taken together, strongly indicate that a celebrated line of this Court's decisions involving the rights of indigent criminal defendants is applicable to the instant case. In *Griffin v. Illinois,* 351 U.S. 12 (1956), this Court held that the Fourteenth Amendment compels a State to furnish a transcript of his criminal trial to an indigent criminal defendant on appeal. Noting the disparity between the ability of indigent and non-indigent defendants to obtain adequate appellate review under then-existing practice, a plurality of the Court decided the case on the broad ground that "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Id.* at 19. Following *Griffin,* the Court required the provision of appointed counsel on an appeal as of right from a criminal conviction in *Douglas v. California,* 372 U.S. 353 (1963).

Under the principle of these cases, the States are obligated to provide indigent criminal defendants with items of evidence necessary for pretrial preparation. *See Britt v. North Carolina,* 404 U.S. 226, 227 (1971) ("[T]he State must provide an indigent defendant with a transcript of prior proceedings when that transcript is needed for an effective defense or appeal"); *Roberts v. LaVallee,* 389 U.S. 40, 42 (1967) ("[D]ifferences in access to the instruments needed to vindicate legal rights, when based upon the financial situation of the defendant, are repugnant to the Constitution"). The Court has further made it clear that *Griffin* and *Douglas* are not dependent upon nomenclature and that they apply to at least some nominally civil proceedings. *See Gardner v. California,* 393 U.S. 367 (1969) (habeas corpus); *Long v. District Court,* 385 U.S. 192 (1966) (habeas corpus); *Lane v. Brown,* 372 U.S. 477 (1963) (coram nobis); *Smith v. Bennett,* 365 U.S. 708 (1961)

(habeas corpus). Even more important, this Court has extended the principle of *Griffin* to a case involving a mere $250 fine. *Mayer v. City of Chicago,* 404 U.S. 189 (1971). In doing so the Court looked in part to the practical effects of the proceeding involved. "A fine," it observed "may bear as heavily on an indigent accused as forced confinement." *Id.* at 197.

While criminal defendants stand on a particularly exalted constitutional plane for obvious reasons, the underlying principles involved in the *Griffin-Roberts-Britt-Mayer* line of cases are plainly relevant to the instant case. Here, as in those cases, the full power of the State has been brought against an indigent defendant in a judicial proceeding. Here, as in those cases, the defendant is indigent because he is incarcerated by the very State that has summoned him into court. And here, as in those cases, the defendant, because of his indigence, has been deprived of an item absolutely crucial for an effective presentation of his case.

At bottom the common property of *Griffin* and the instant case is an abiding, fundamental unfairness. Disparities between private litigants and their resources are an inescapable fact of life and are hardly repugnant to the Constitution. But when "the State with all its resources and power," *Green v. United States,* 355 U.S. 184, 187 (1957), hales into a court a man whom it has rendered indigent by incarceration in a case pregnant with criminal implications and there denies him a readily available laboratory test that has a greater than 90% chance of conclusively proving his innocence, the heavy-handed role that the State is choosing to assume does not rest easily with the requirements of due process. This "suppression by the prosecution of evidence favorable to an accused" may not be accomplished with the same culpability as the suppression in *Brady v. Maryland,*

373 U.S. 83, 87 (1963), but it is no less real. This Court has noted in *Wardius v. Oregon,* 412 U.S. 470, 474 (1973), that "[T]he Due Process Clause. . .does speak to the balance of forces between the accused and his accuser." *See United States v. Ash,* 413 U.S. 300, 309 (1973). In the instant case, that "balance of forces" was egregiously unfair and worked a correspondingly unfair result. It is the historic role of this Court in such cases "to keep the balance true." *Snyder v. Massachusetts,* 291 U.S. 97 (1934).

Sixth. In Connecticut this imbalance of forces is further exacerbated by a unique evidentiary burden placed upon defendants in paternity proceedings. Since the enactment of Connecticut's original bastardy statute in 1672, plaintiffs and defendants in paternity actions have been placed in dramatically unequal positions. The language of the original statute gives some indication of the idiosyncracy that has historically marked this area of the law:

> [T]he man charged by the Woman to be the Father, she holding constant in it (especially being put upon the real discovery of the truth of it in the time of her travel) shall be the reputed Father, and accordingly be liable to the charge of maintenance. . .notwithstanding his denyal; unless the circumstances of the case and pleas be such on the behalf of the man charged, as that the Court. . .shall see reason to acquit him.

The Book of the General Laws for the People within the Jurisdiction of Connecticut 6 (1673).

Bastardy actions, moreover, provided the sole exception to the common law rule that parties to legal actions could not testify on their own behalf. As the Supreme Court of Connecticut later explained:

> [I]n cases of illegitimate children, it was considered so unjust that the mother should bear, not only the suffering and danger attendant upon maternity, but in

> addition the whole expense of supporting her child, when there was another equally in fault, to say the least, in respect to its birth, that an exception was made of suits brought by her for the maintenance of the child, and she was allowed to testify who was its father under certain safeguards provided by the statute.

Booth v. Hart, 43 Conn. 480, 485 (1876). The putative father, on the other hand, was not permitted to testify, *id.* at 486, but was considered protected by the requirement that the mother be examined under oath and put to "discovery in the time of her travail," *Town of Chaplin v. Hartshorne,* 6 Conn. 41, 44 (1825). It was "recognized as a fact, established by human experience, that, at such a time, a woman in her anguish would be apt to speak as to that matter, and to speak the truth." *State v. Sebastian,* 81 Conn. 1, 7, 69 A. 1054, 1056 (1908). If the defendant were to prove himself innocent, he was compelled to do so "by other evidence than his own." *Booth v. Hart, supra,* 43 Conn. at 480.

This review of colonial bastardy law has been necessary because certain of its basic evidentiary anomalies persist in Connecticut to this day. Although 1848 Conn.Pub.Acts. ch. 44 § 1 eliminated the testimonial disqualification of parties, including putative fathers, the Supreme Court of Connecticut compensated for this change by nullifying the statutory requirement that the mother be put to the discovery in the time of her travail. *Booth v. Hart, supra.* Bastardy proceedings thus became swearing contests, but contests in which the defendant was placed at a singular disadvantage. As the Supreme Court of Connecticut explained in *Mosher v. Bennett,* 108 Conn. 671, 674, 144 A. 297, 298 (1929), the mother's constancy of accusation is sufficient to make out a prima facie case. "The prima facie case so made out places upon the reputed father the burden of showing his

innocence of the charge, and under our practice *he must do this by other evidence than his own.*" *Id.* (emphasis added).

Under this rule the instrinsic imbalance present in bastardy proceedings prior to the 1848 qualification statute has been, if anything, exacerbated. The mother need not be "put to the discovery" because the putative father can now testify, but although the putative father may now testify his testimony will do him no good unless he manages to find other evidence to support his defense. His testimony, no matter how credible, is legally insufficient to outweigh the plaintiff's testimony, no matter how incredible, in the pans of justice. This is very much the law in Connecticut today. *See Kelsaw v. Green,* 6 Conn. Cir. Ct. 516, 276 A.2d 909 (App. Div. Cir. Ct. 1971). Given this evidentiary requirement, a blood grouping test is even more important to the defendant that it would otherwise be. This rule not only renders "the balance of forces" in a proceeding agaist an indigent yet more egregiously unfair, but strips a hearing where the defendant has been denied such a test of much of whatever meaning it might have otherwise possessed.

Finally. It is of the utmost importance that the thing at issue in the instant case is not a contract for the delivery of potatoes or the title to a parcel of land or the monetary damages attendant upon an automobile accident but the paternity of a child. This Court has long rejected the Platonic doctrine that the State should control the parent-child relationship according to its own notions of expediency. *See Meyer v. Nebraska,* 262 U.S. 390, 401-02 (1923). "The child is not the mere creature of the State." *Pierce v. Society of Sisters,* 268 U.S. 510, 535 (1925). In this case, however, the State has brought an unwilling defendant and an unrepresented child before its own court system and judicially established a parent-child relationship between

them while abjuring the use of the most probative available evidence to determine whether such a relationship in fact exists. The Court should not countenance this cavalier treatment of the parties involved.

This Court has, in recent years, recognized that both unwed fathers and illegitimate children possess certain substantive rights under the Fourteenth Amendment. *Stanley v. Illinois,* 405 U.S. 645 (1972), established that an unwed father has an "interest. . .in the children he has sired and raised [that] undeniably warrants deference and, absent a powerful countervailing interest, protection." *Id.* at 651. *Cf. Caban v. Mohammed,* 441 U.S. 380 (1979) (invalidating a gender-based statute disabling an unwed father from blocking the adoption of his child).

This case, to be sure, is in many ways the converse of *Caban* and *Stanley.* The fathers in those cases were attempting to assert parental rights, while the appellant here denies that he is, in fact, a parent. But the establishment of a parental relationship, even under these circumstances, not only entails the obvious financial responsibilities that have been thrust upon the putative father but quite possibly a host of other legal, moral, and emotional responsibilities that cannot even be forseen at the present time. The establishment of such a relationship by judicial fiat should thus invoke the same basic protections that would attend the termination of that relationship.

There is, moreover, another interest present in the instant case. The court below not only made Walter Little a parent while depriving him of the crucial evidence necessary to defend that allegation, but it simultaneously made Kenyatta Streater his daughter. The fact that the State has chosen to use its judicial machinery to pronounce this child the daughter of a criminal on less than the best available

evidence is a poignant indication of its cavalier approach to a judicial proceeding that should be characterized by the most painstaking thoroughness.

This is particularly ironic because Congress, in enacting 42 U.S.C. §654 (1976), which compels the States to bring paternity proceedings against the putative fathers of illegitimate AFDC recipients, plaintly intended the States to endeavor to establish the biological relationships involved accurately. The Senate Committee on Finance stated in its report:

> The Committee believes that an AFDC child has a right to have its paternity ascertained in a fair and efficient manner unless identification of the father is clearly against the best interests of the child. Although this may in some cases conflict with what a social worker considers the mother's short term interests, the Committee feels that the child's right to support, inheritance, and to know who his father is deserves the higher social priority.

S. Rep. No. 93-1356, 93d Cong. 2d Sess. 51 (1974), *reprinted in* [1974] U.S. Code Cong. & Ad. News 8133, 8154-55.[30]

This Court has established that children born out of wedlock have some minimal constitutional rights to support, *see Gomez v. Perez,* 409 U.S. 535 (1973), inheritance, *see Trimble v. Gordon,* 430 U.S. 762 (1977), and to a

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[30]Interestingly, when the Senate first considered H.R. 17045, 93d Cong., 2d Sess. (1974), the vehicle by which 42 U.S.C. §654 (1976) was ultimately to be enacted, it amended that bill to establish a national system of laboratories that would provide state courts with blood test evidence. 120 Cong. Rec. 40321 (1974). This amendment was later deleted by a conference committee, H.R. Rep. No. 93-1643, 93d Cong., 2d Sess. 30 (1974), *reprinted in* [1974] U.S. Code Cong. & Ad. News 8161, 8162, possibly because of civil libertarian fears about the intended use of the tests as positive, as well as negative, evidence of paternity.

continuing relationship with their biological fathers, *see Caban v. Mohammed* and *Stanley v. Illinois, supra.* "[T]he child's right to support, inheritance, and to know who his father is" recognized by the Senate Committee on Finance is thus a judicially cognizable interest as well. The Supreme Court of Nebraska has noted that a child's interest in a judicial proceeding "may be adverse to both parents in the case." *Ford v. Ford,* 191 Neb. 548, 549-550, 216 N.W. 2d 176, 177 (1974). The judicial determination of parentage will have "a much deeper impact upon the children as they grow older as to their identity, the procuring of their necessary support from the real father, inheritance rights, and many others." *Id.* at 550, 216 N.W. 2d at 177.

Under these circumstances, it is in the interest of both the putative father and the child in question that, if a parent-child relationship exists, its existence be determined *accurately.* To deprive the parties of an accurate determination of paternity solely because of the poverty of the putative father "needlessly risks running roughshod over the important interests of both parent and child." *Stanley v. Illinois, supra,* 405 U.S. at 657. We respectfully submit that the State of Connecticut has indeed run roughshod over these important interests in the instant case.

The distinguishing characteristics of this case collectively indicate that the Court should give the quality of the hearing afforded appellant a particularly rigorous scrutiny. If, as we have urged, the Due Process Clause *does* speak to the qualitative aspects of the hearings afforded involuntary litigants in cases where family rights are at issue and the balance of forces egregiously unfair, the hearing afforded

appellant in this case must be deemed deficient. The denial of access to a readily available laboratory test, that conclusively excludes more than 90% of all falsely accused men, to the defendant in this case solely because of his proverty rendered the swearing contest in which he was necessarily placed unmeaningful in a constitutional sense.

"[A]bsent a countervailing state interest of overriding significance," this denial of "a meaningful opportunity to be heard" was a denial of due process. *Boddie v. Connecticut,* 401 U.S. 371, 377 (1971). But here, as in *Boddie,* the State's only legitimate countervailing interest is "resource allocation or cost recoupment." *Id.* at 382. That justification was offered and rejected in *Boddie.* It is, if anything, even less convincing in the instant case, where the State is aggressively using its judicial system to gain monetary judgments from indigent defendants. This justification should be rejected. The State is not, under the Due Process Clause, free to deny such overwhelmingly probative evidence to indigent persons, particularly its own indigent prisoners, that it chooses to hale into court.

II. THE DENIAL OF BLOOD GROUPING TESTS TO A DEFENDANT IN A PATERNITY PROCEEDING SOLEY BECAUSE OF HIS INDIGENCY DENIES HIM THE EQUAL PROTECTION OF THE LAWS.

Connecticut's requirement that all defendants in paternity proceedings, irrespective of means, must pay for blood grouping tests in advanceof trial or do without them altogether not only works a palpable injustice on the individual parties in any given proceeding but has a per-

vasive and pernicious effect on the entire system of paternity law. The requirement has ineluctably resulted in a dual system of justice.

Because of the extraordinary frequency with which modern blood grouping tests conclusively exclude falsely accused putative fathers there is, needless to say, no question that nonindigent defendants who dispute their paternity will utilize these tests. In return for the payment of a modest laboratory fee, more than 90% of all innocent nonindigent defendants obtain swift, scientific, and absolutely unimpeachable exonerations. Indigent defendants, on the other hand, are summarily placed in swearing contests in which the pans of justice are loaded against them. These are contests, moreover, in which even the fairest and most conscientious judges can rarely claim to render decisions not open to doubt. There are, consequently, two dramatically different systems of justice: a reliable one for defendants with assets and an unreliable one for the poor. This glaring disparity is inconsistent with the historic requirements of the Equal Protection Clause.

Conn.Gen.Stat. §46b-168(1979) applies on its face to rich and poor alike. But as this Court noted in *Griffin v. Illinois,* 351 U.S. 12, 17 n.11 (1956) (plurality opinion), "[A] law non-discriminatory on its face may be grossly discriminatory in its operation." Here the Connecticut statute worked an invidious discrimination against appellant solely because he was unable to pay the laboratory fee. *See Williams v. Illinois,* 399 U.S. 235, 242 (1970).

This Court observed in *Harper v. Virginia Board of Elections,* 383 U.S. 663, 668 (1966), that "Lines drawn on the basis of wealth or property, like those of race, are traditionally disfavored." Economic barriers are particularly disfavored when they impede effective access to the

courts. Thus, in *Griffin v. Illinois, supra,* the Illinois rule requiring all defendants in noncapital criminal cases, whether indigent or not, to purchase a stenographic transcript of the trial proceedings for use on appeal was deemed to "effectively den[y] the poor an adequate appellate review accorded to all who have enough money to pay the costs in advance." *Id.* at 18 (plurality opinion). *Griffin*'s broad holding that "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has," *id.* at 19, is grounded in the requirements of equal protection as well as those of due process. This is similarly the case with *Griffin*'s progeny, discussed at pp. 28-29, *supra.*

In its most celebrated and thorough analysis of the requirements of the Equal Protection Clause *vis-a-vis* discrimination against the indigent, this Court noted the common properties of the *Griffin* line of cases:

> The individuals, or groups of individuals, who constituted the class discriminated against in our prior cases shared two distinguishing characteristics: because of their impecunity they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit.

San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 20 (1973). The school financing system at issue in *Rodriguez* was held not to violate traditional concepts of equal protection because it did not discriminate "against a class of definably 'poor' persons." *id.* at 22, and because, in that case, "lack of personal resources has not occasioned an absolute deprivation of the desired benefit," *id.* at 23. The Court acknowledged, however, that a case involving an inflexible tuition fee that some pupils could pay and others could not "would present a far more compelling set of circumstances for judicial assistance." *Id.* at 25 n.60.

In contrast to *Rodriguez,* the instant case presents a classic example of a prohibited discrimination against the poor. The inflexible laboratory fee necessary to obtain a blood test creates two sharply distinguished classes of paternity defendants: those who happen to have the modest personal resources necessary to pay the fee, and those who do not. The putative fathers lacking such resources must, moreover, completely do without the desired scientific evidence, while the nonindigent readily obtain that evidence and, if falsely accused, are overwhelmingly likely to conclusively prove their innocence. And, just as "the ability to pay costs in advance bears no rational relationship to a defendant's guilt or innocence," in a criminal case, *Griffin v. Illinois, supra,* 351 U.S. at 17-18 (plurality opinion), the putative father's ability to pay for a blood test bears no rational relationship to his paternity or nonpaternity.

We recognize that in *United States v. Kras,* 409 U.S. 434 (1973), and *Ortwein v. Schwab,* 410 U.S. 656 (1973), this Court found that the bankruptcy and appeal filing fees at issue in those cases did not violate the Equal Protection Clause. Those cases involved litigation "in the area of economics and social welfare," *United States v. Kras, supra,* 409 U.S. at 446. Paternity litigation cannot, however, be so described. As is discussed at some length in the due process portion of this Brief, pp. 22-36, *supra,* paternity proceedings are marked by certain characteristics, notably their quasi-criminal nature and their direct impact on family relationships, that readily distinguish them from typical civil proceedings involving issues entirely reducible to monetary terms. A putative father's interest in the accurate determination of his paternity, in particular, should "come to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting

economic arrangements." *Kovacs v. Cooper,* 336 U.S. 77, 95 (1949) (Frankfurther, J. concurring). *See Stanley v. Illinois,* 405 U.S. 645, 651 (1972).

Connecticut's draconian blood test rule is, in any event, far more pernicious than the filing fees at issue in *Kras* and *Ortwein.* Its influence is systemic. The litigants in those cases were would-be plaintiffs.[31] If they did not have the necessary funds when they sought to file their claims they could at least hope to litigate those claims at a later date when the necessary funds had been acquired. Moreover, as the Court emphasized, they had at least some alternatives to the judicial remedy. *Ortwein, supra,* 410 U.S. at 659. But putative fathers are, by definition, *defendants.* They cannot wait for more prosperous days to litigate their claims. Rather, they must appear in court at a date certain, with or without the necessary evidence. It is because of this inescapable fact that Connecticut has created a dramatic and unconscionable disparity between classes of involuntary litigants. Nonindigent putative fathers can purchase reliable, scientific justice; indigent ones cannot. In the words of Justice Black, writing for the plurality in *Griffin v. Illinois,* "Such a denial is a misfit in a country dedicated to affording equal justice to all." 351 U.S. at 19. Justice Frankfurter may, however, be permitted the final observation:

> To sanction such a ruthless consequence, inevitably resulting from a monetary hurdle erected by a State, would justify a latter-day Anatole France to add one more item to his ironic comments on the "majestic equality" of the law. "The law, in its majestic equality, forbids the rich as well as the poor to sleep under

[31]Although the welfare recipients in Ortwein were technically appellants, they were seeking an initial judicial review of their welfare claims in the Oregon Court of Appeals, and were thus plaintiffs in effect. *Ortwein v. Schwab,* 410 U.S. 656, 658 (1973).

> bridges, to beg in the streets, and to steal bread." (John Cournos, A Modern Plutarch, p. 27.)
>
> The State is not free to produce such a squalid discrimination.

Griffin v. Illinois, supra, 351 U.S. at 23-24 (Frankfurter, J. concurring).

CONCLUSION

Conn.Gen.Stat. §46b-168 (1979), violates the Due Process and Equal Protection Clauses of the Fourteenth Amendments. The judgment of the Appellate Session of the Superior Court of Connecticut should therefore be reversed.

Respectfully submitted,

JON C. BLUE
Legal Assistance to Prisoners
340 Capitol Avenue
Hartford, Connecticut 06106
(203) 566-2030

Court-appointed Counsel
for Appellant